91-632

(1)

No. _____

In The

Supreme Court of the United States

October Term, 1991

WALTER CHRISTOPHER GURASICH,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case, arising from petitioner's conviction in California state court for insurance fraud and for aiding and abetting arson, presents the following question:

> Does a retrial following acquittal of one count and mistrial of a second count constitute a "subsequent prosecution" under the meaning of *Grady v. Corbin*, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), where the conduct involved in the retried count is identical to the conduct constituting the offense for which the petitioner was acquitted?

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Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

Petitioner, Walter Christopher Gurasich, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, entered in the above-entitled proceeding on March 8, 1991.

OPINION AND ORDERS BELOW

The unpublished opinion of the California Court of Appeal, Second District, Division Six, is reprinted in the Appendix to this petition [App. 1-16].[1] The order denying

[1] The appendix is cited as App., followed by page number.

petitioner's petition for rehearing is unreported and reproduced in App. 18. The order of the California Supreme Court denying petitioner's petition for review is unreported and reproduced in App. 17.

JURISDICTION

The opinion of the California Court of Appeal was filed March 8, 1991 [App. 1]. Petitioner filed a timely petition for rehearing, which the court denied April 1, 1991 [App. 18]. On May 29, 1991, the California Supreme Court denied a petition for discretionary review of the appellate court decision [App. 17]. Hence, this petition for a writ of certiorari is timely under Supreme Court Rule 13.1.

This Court's jurisdiction to grant certiorari is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides:

> ". . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Double Jeopardy Clause is enforceable against the States through the Fourteenth Amendment to the United States Constitution (*Grady v. Corbin*, ___ U.S. ___, 110 S. Ct. 2084, 2087, fn. 1, 109 L.Ed.2d 548 (1990)).

The Fourteenth Amendment provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code §1118.1 provides:

> "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right."

California Penal Code §1023 provides:

> "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

INTRODUCTION

Petitioner has been convicted of arson for the burning of his motorhome despite the state's acknowledgement that petitioner could not have set the fire (he was several hundred miles away at the time). Petitioner was also convicted of making a false insurance claim, based on his purported involvement in the arson.

The prosecution's theory was that petitioner had a motive to get rid of the motorhome and that he arranged with an acquaintance, Gerard Vaccaro, to dispose of the vehicle. The only evidence offered in support of this reasoning was a license plate traceable to Vaccaro found under the burning motorhome, and telephone records indicating that petitioner was charged for a handful of short calls to Vaccaro's phone number before the motorhome disappeared from where petitioner had left it.

The arson conviction thus rests exclusively on a theory that petitioner aided and abetted Vaccaro by making an agreement to have Vaccaro destroy the supposedly unwanted motorhome. The constitutional defect is that, in an earlier phase of this prosecution, the trial court *acquitted* both defendant and Vaccaro of conspiring to burn the motorhome – on the identical evidence.

Petitioner believes that his retrial and, ultimately, his conviction, were barred under *Grady v. Corbin*, ___ U.S. ___, 110 S. Ct. 2084, 109 L.Ed.2d 584 (1990), because the prosecution relied on identical conduct to prove arson and insurance fraud as it had in attempting to establish conspiracy to commit arson. However, the California Court of Appeal ignored *Grady*, holding:

> "While there may have been two trials, there was but one prosecution. A retrial of a count on which the jury fails to agree is not another prosecution within the meaning of Penal Code §1023" [App. 8, internal quotation marks deleted].

This case presents none of the unpleasantness that must have made the *Grady* decision unusually difficult: petitioner did not plead guilty to a traffic violation in order to avoid a manslaughter conviction. Instead, a trial judge in the first trial heard all the prosecution's evidence and *acquitted* petitioner of conspiracy to commit arson. Petitioner should not have been later convicted of the same conduct.

STATEMENT OF THE CASE

The Two Trials

In the first of his two trials, petitioner was charged with (1) filing three false insurance claims (two unrelated to the motorhome), (2) conspiring with Vaccaro to burn the motorhome, and (3) arson.

Petitioner and Vaccaro were tried jointly, and both moved for acquittal under California Penal Code §1118.1. The trial court granted petitioner's motion as to the two unrelated fraud counts, and acquitted both petitioner and Vaccaro of the conspiracy charge. Petitioner's trial continued on the arson count and the remaining fraud count, but the jury could not agree and the court ultimately granted a mistrial. Petitioner was then retried for arson on a theory that he aided and abetted Vaccaro, and for

filing a false insurance claim, leading to the present conviction.

Background Facts

The prosecution relied on identical conduct to establish arson and insurance fraud in the second trial as it had used in its attempt to prove conspiracy to commit arson in the first trial, as follows:

On September 14, 1986, petitioner and his son drove from Santa Barbara, California, to Redding, California in petitioner's motorhome. Petitioner made frequent trips to Redding and often left a vehicle at the Redding Airport. On September 17, petitioner returned to Santa Barbara, leaving the motorhome at the airport. On the 19th he flew back to Redding and discovered that his motorhome was missing.

Petitioner contacted Redding police immediately and notified his insurance agent of the theft. After a dispute over the value of the motorhome, petitioner's insurer paid him $29,000 for the loss.

Three weeks after petitioner had reported his motorhome missing, the vehicle was found on fire in Hayward, California, about 200 miles from Redding; the fire had been set deliberately. A license plate found underneath the motorhome belonged to a car a third person had sold to Vaccaro.

There were phone calls between petitioner's number and Vaccaro's around the time petitioner left the motorhome in Redding, and one call from Vaccaro's number to a Santa Barbara phone booth several months

later. There was no evidence about who made the calls, who received them, whether the parties actually spoke with one another, or what the conversations, if any, were about.[2]

In the first trial, the People argued that the handful of calls to Vaccaro's phone number charged to petitioner's phone suggested an agreement between petitioner and Vaccaro to make it look as if petitioner's motorhome had disappeared by theft. The remainder of the People's case rested on the fact that the motorhome was intentionally burned and the argument that petitioner had a motive for having the motorhome destroyed.

In the second trial, the prosecution relied on the same evidence and conduct to argue that petitioner aided and abetted Vaccaro in burning the home and made a fraudulent insurance claim. The prosecution conceded that "[t]here's no evidence in this case that Mr. Gurasich set fire to the motor home" [RT 794:23-24][3], and if petitioner were involved at all "it's because he caused somebody else to burn the motor home" [RT 795:3-5]. In arguing to the jury, the district attorney stated:

> " . . . I make no bones about it, this is our position in the case. Mr. Gurasich and Mr. Vaccaro cooked this scheme up" [RT 799:19-21].

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[2] Beyond the matters cited in text, the state argued that the jury could draw inferences adverse to petitioner from disbelief of a witness who testified in petitioner's favor.

[3] RT refers to the reporter's transcript of the second trial.

The Appeal

On appeal, petitioner asserted procedural errors, lack of substantial evidence, and the constitutional violation inherent in trying him a second time and convicting him for conduct of which he had been acquitted: "cooking up" a scheme with Vaccaro to destroy his motorhome and thus defraud his insurer. The California Court of Appeal rejected the procedural points [App. 10-15], held there was substantial evidence to support conviction [App. 8-10], and dismissed the double jeopardy argument by noting that the second trial followed a mistrial, and was therefore not "another prosecution" [App. 8].

ISSUES RAISED BELOW (RULE 14(H))

Double jeopardy has two aspects: An accused may not be retried for an offense for which he was previously been in jeopardy (whether the first trial resulted in conviction or acquittal); and he may not be convicted of conduct for which he has previously been acquitted. This case involves both aspects.

Second Trial

Section I of the petition raises the issue of whether, under the reasoning of *Grady v. Corbin, supra,* the prosecution was barred from going forward with petitioner's second trial at all. Concededly, petitioner's counsel did not raise this issue at trial, before *Grady* had been decided. Nonetheless, petitioner has preserved the issue by asserting it for the first time in his opening brief on appeal, which was filed a mere *five days* after this Court decided *Grady v. Corbin*. Petitioner has further preserved

that claim by asserting it in his reply brief and petition for rehearing in the intermediate state court, as well as in his petition for review to the California Supreme Court.[4]

Conviction Following Acquittal

There can be no question that petitioner did all that was necessary to preserve review with respect to the second, collateral estoppel aspect of double jeopardy (discussed in Section II, below). It was not until all the evidence was in and the prosecutor had argued the state's case at the second trial that it could be said with certainty that the prosecution relied solely on the same conduct as was at issue in the first trial. Only after the jury returned its verdict could one argue that petitioner had, in fact, been convicted based on conduct for which he had been acquitted previously.

Petitioner timely preserved this issue, raising it *four times* below: in his opening brief, his reply brief, his petition for rehearing, and his petition for review.

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[4] The California Court of Appeal suggested that defendant waived this issue (App. 7). Given the timing of *Grady*, it seems impossible to find a waiver. However, as defendant noted twice below (in his petition for rehearing before the court of appeal and in his petition for review before the California Supreme Court), if it was so evident before the second trial that defendant was being retried for conduct for which he had once been acquitted that his trial lawyer should have asserted this defense at the outset of the second trial, the attorney's failure to do so would constitute ineffective assistance of counsel. There is no conceivable tactical basis for failing to assert the double jeopardy bar (*see, Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S.Ct. 2052, 2065-2066, 80 L.Ed.2d 674 (1984)).

REASONS FOR GRANTING CERTIORARI

I.

GRADY'S PROHIBITION AGAINST "SUBSEQUENT PROSECUTION" BASED ON THE SAME CONDUCT APPLIES WHERE A DEFENDANT IS ACQUITTED ON ONE COUNT AND A MISTRIAL IS DECLARED AS TO A SECOND, FACTUALLY IDENTICAL, COUNT

This Court has stated that the determination of whether a prosecution or punishment violates the "double jeopardy" prohibition does not depend on a mechanistic comparison of the elements of the offenses at issue (*Grady, supra,* 110 S.Ct. at 2090-2092; *Illinois v. Vitale,* 447 U.S. 410, 420, 100 S.Ct. 2260, 2267, 65 L.Ed.2d 228 (1980)). Instead, one is subject to double jeopardy if, to establish an essential element of an offense charged in a subsequent prosecution, the government must prove *conduct* that constitutes an offense for which the defendant already has been prosecuted (*Grady, supra,* 110 S.Ct. at 2090).

Petitioner should not have been tried a second time, let alone convicted. When the second trial started, he had *already* been acquitted of the only conduct the People have ever identified as suggesting criminal activity by him: purportedly making it look like the vehicle was stolen, and making sure it would not reappear by agreeing to have Vaccaro dispose of the vehicle.

By persistence, and in contravention of the double jeopardy prohibition, the prosecution convicted petitioner after he had been acquitted. This result undermines not just this Court's decision in *Grady,* but the very fabric of double jeopardy protection.

The California Court of Appeal's treatment makes it apparent that further guidance is needed from this Court about the application of the Double Jeopardy Clause to retrials following partial mistrials, and about the interpretation of *Grady v. Corbin* in the context of trial for a substantive offense following trial for conspiracy.

A. *GRADY V. CORBIN* APPLIES FOLLOWING A MISTRIAL

According to the state court, there was no need to undertake a *Grady*-type examination of the conduct for which petitioner was tried in the second trial because that trial followed a mistrial, and thus did not constitute a "subsequent prosecution" for the purposes of double jeopardy analysis [App. 11]. Such a rule is constitutionally unacceptable.

It is true that a retrial following a hung jury is not "another prosecution," in the sense that the second trial is related to the first trial and bears the same case number and caption. But these truisms do not end the double jeopardy inquiry. Petitioner's second trial was unmistakably an attempt to convict petitioner of conduct identical to that for which he had been acquitted.

In *Grady*, this Court reiterated a principle "deeply ingrained in at least the Anglo-American system of jurisprudence" that:

> " . . . the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him

> to live in a continuing state of anxiety and insecurity . . . "

(*Grady v. Corbin, supra,* 110 S.Ct. at 2091, quoting *Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

The fact that the second attempt to convict a defendant of the *same conduct* follows an acquittal on conspiracy charges and a mistrial on the substantive offense, rather than a simple acquittal, does not lessen the degree of "embarrassment, expense and ordeal" that the defendant must suffer. The appellate court's decision here overlooks that a "tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding" (*Grady, supra,* 110 S.Ct. at 2092).

The lower courts' insouciance regarding petitioner's meritorious double jeopardy claim underscores the need for this Court's guidance on an important constitutional protection.

B. WHETHER A DEFENDANT CAN BE TRIED OR CONVICTED OF A SUBSTANTIVE OFFENSE FOLLOWING ACQUITTAL OF CONSPIRACY TO COMMIT THAT OFFENSE MUST BE DECIDED ACCORDING TO THE CONDUCT SOUGHT TO BE PROVED IN THAT CASE

Under California law, conspiracy requires proof of two elements: (1) an illegal agreement, and (2) at least one overt act in furtherance of that agreement (*People v. Fujita,* 43 Cal.App.3d 454, 471 (1974), *cert. denied,* 421 U.S. 964 (1975)). The State charged three separate overt acts, but needed to prove only one of those acts to convict

petitioner. At least one of the charged overt acts did occur: Petitioner did report his motorhome stolen. Therefore, the trial court could not have based its decision to acquit petitioner on the prosecution's failure to establish an overt act. Instead, the basis of acquittal must have been the prosecution's failure to prove the agreement.

In the second trial, the only way the jury could have found petitioner guilty of either arson or insurance fraud was if it found that he made an agreement with Vaccaro to destroy the motorhome. No one has ever suggested petitioner was directly involved in burning the motorhome; in fact, the prosecutor conceded that petitioner could not have done so [*see* p. 7, *supra*]. Petitioner was convicted on a theory that he aided and abetted Vaccaro by making an agreement with him to have someone else burn the vehicle. Thus, without proof of the alleged agreement, there is no proof that petitioner had any liability whatsoever for the arson. Similarly, if he did not make an illegal agreement to destroy the motorhome, then there was nothing fraudulent about his insurance claim.

The state proved no new conduct, relying instead on conduct of which petitioner was previously acquitted. Such result violates the Double Jeopardy Clause.

II.

COLLATERAL ESTOPPEL PRECLUDED DEFENDANT'S SECOND TRIAL

The state court of appeal entirely ignored petitioner's assertion that his retrial also violated the collateral estoppel aspect of double jeopardy.

The doctrine of collateral estoppel is an "extremely important principle in our adversary system of justice", a principle that is "embodied in the Fifth Amendment guarantee against double jeopardy" (*Ashe v. Swenson*, 397 U.S. 436, 443-445, 90 S.Ct. 1189, 1194-1195, 25 L.Ed.2d 469 (1970)). Collateral estoppel "simply means that when a[n] issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" (*Id.*, 397 U.S. at 443, 90 S.Ct. at 1194). Thus, successive prosecution is barred "where the second prosecution requires the relitigation of factual issues already resolved by the first" (*Brown v. Ohio*, 431 U.S. 161, 166, fn. 6, 97 S.Ct. 2226, fn. 6, 53 L.Ed.2d 187, fn. 6 (1977)).

As discussed above, the issue of whether petitioner entered into an agreement with Vaccaro was crucial to any finding that he aided and abetted Vaccaro in committing arson or that he made a fraudulent insurance claim. This factual issue already had been resolved by the first trial, as evidenced by petitioner's acquittal on the conspiracy count. The judgment of acquittal was a valid and final judgment, and the parties – petitioner and the People of the State of California – were the same in both trials. Accordingly, under the reasoning of *Ashe v. Swenson, supra*, 397 U.S. 436, 90 S.Ct. 1189, and its progeny, the state violated the collateral estoppel aspect of double jeopardy by relitigating the issue of the agreement in the second trial.

CONCLUSION

This Court's opinion in *Grady v. Corbin, supra,* 110 S.Ct. 2084, was an important step in defining the protections afforded by the Double Jeopardy Clause of the Fifth Amendment. Nevertheless, as the opinion of the California Court of Appeal in this case shows, there remains significant confusion about the effect of *Grady* on multiple trials within a "single prosecution". Such confusion has turned an acquittal into a conviction. Accordingly, this Court should grant certiorari and allow further briefing of the issues raised in this petition.

Respectfully submitted,

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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. WALTER CHRISTOPHER GURASICH, Defendant and Appellant.	2d Crim. No. B045803 (Super.Ct. No. 169470) (Santa Barbara County) (Filed Mar 8 1991)

Walter Christopher Gurasich appeals from a judgment following conviction by jury of one count of arson for pecuniary gain (Pen. Code, § 451, subd. (d)) and one count of defrauding his insurer (Ins. Code § 556). The jury also found true two allegations of loss in excess of $25,000. (Pen. Code. § 12022.6.) He claims that 1) the constitutional prohibition against double jeopardy bars prosecution for arson or fraud; 2) insufficient evidence supports the verdicts; 3) certain procedural errors require reversal; and 4) the trial court relied upon inappropriate factors in sentencing. We find no prejudicial error and affirm the judgment.

FACTS

Appellant owned a 1983 diesel-powered motor home which he registered in Oregon in the name of the Gurasich Family Trust, of which he was the sole trustee. The California Department of Motor Vehicles (DMV) differed in opinion with appellant concerning the necessity of registering his vehicles in California and, in 1985, issued a "seize and sell" order to collect California registration fees and fines of approximately $3,500. In 1986, appellant obtained a $32,000 comprehensive and collision insurance policy on the motor home from Foremost Insurance which covered the vehicle and any accessories, but not the contents.

September 19, 1986, appellant reported his motor home stolen, but because he did not recall the license number, was told to call back. When he called back on Monday, the 22nd, he was told he would have to sign a stolen vehicle report in Santa Barbara, which he did on September 23rd. He told the police and his insurance agent that he had parked the vehicle at the Redding Airport on September 15, 1986, and that when he returned to the airport four days later, September 19, the motor home was missing. The motor home was found on fire in a remote industrial area of Hayward, approximately 200 miles from Redding, in the early morning hours of October 8, 1986. The fire was deliberately set and the motor home stripped before it was burned. The original license plate was missing. A burnt license plate was found under the vehicle near the rear bumper and appeared to have been attached by a piece of wire. The plate was traced to a 1972 Volkswagen sold to Jack Andrews, a self-employed welder in Hayward. Andrews

did not register the transfer with the DMV since he did not intend to drive it. He used the engine to replace one in another Volkswagen and traded the engineless Volkswagen to Gerald Vaccaro, a long-time friend of appellant, who had a salvage surplus business in San Leandro.

Appellant claimed the policy limits, asserting that he had many customized and specialized accessories on the vehicle. Because he could not produce documentation for the accessories and because the insurance company claimed the diesel engine devalued the vehicle, appellant and Foremost engaged in verbal and written skirmishes during which appellant mentioned the terms "bad faith." Foremost agreed to settle with appellant for $29,000.

The evidence at trial adduced that appellant usually maintained a vehicle at the Redding Airport because he had a ranch in the vicinity which he used for hunting and fishing. Hunting and fishing companions and appellant's son testified that appellant used the motor home for packing them into the area with their gear and that the vehicle had custom chrome wheels, storage pods, microwave, custom alpine stereo, power antenna, special 50-gallon propane tank, and mirrors.

Appellant drove the motor home to Redding on the 15th because he had to appear in court on a civil action on September 17th and 19th. His son, Chris, accompanied him. He left the motor home at the airport after dropping Chris at the home of his girlfriend's grandmother. Chris later returned to the motor home to retrieve his forgotten shaving kit and noticed the vehicle had a flat tire. Chris could not recall the grandmother's name or address when

he testified nor did he have a current address or telephone number for the girlfriend. Appellant drove his Chevy truck back to Santa Barbara and flew to Redding on the 19th. He took a shuttle bus to the courthouse and a friend drove him back to the airport after court. Appellant did not mention to the friend that the motor home was missing.

Telephone records revealed that calls between appellant and Vaccaro commenced in May of 1986 and continued through 1987. Two calls were placed on appellant's home telephone to Vaccaro's home in July 1986. In August, there were several other calls from appellant's number to Vaccaro's number. In September, there were at least seven calls from appellant's number to Vaccaro's number. Between September 14 and September 22, calls were made to Vaccaro's number from appellant's home number and from other places charged to appellant's telephone credit card.

One call was placed to Vaccaro's number from a public telephone at a gas station in Salinas September 14 before appellant arrived in Redding. Another was placed to Vaccaro's number on September 17 from Willow, California, and on September 18 and 22 while appellant was in Santa Barbara.

On September 22, a call was made from appellant's number to Vaccaro's number before appellant telephoned the Redding Police Department. Other calls were made from or charged to appellant's number to Vaccaro's number through the remainder of 1986.

In 1986, three calls were placed from Vaccaro's number to appellant's number in Santa Barbara. April 17,

1987, shortly after the DMV investigator interviewed Andrews in Hayward and mentioned the possibility of Vaccaro's involvement, Vaccaro charged a 15-minute telephone call to his number from a public phone to another public phone in Santa Barbara near appellant's residence.

The prosecution asserted that appellant's motive for destroying the motor home to collect the insurance proceeds was to avoid the "seize and sell" order for the $3,500 in fees and fines, and because diesel-powered vehicles were not as popular or valuable as at the time appellant purchased the vehicle. When the DMV investigator interviewed appellant about the missing vehicle, appellant did not want to discuss anything that would influence his pending proceedings with the DMV concerning registration of the vehicle, and would not say how the vehicle arrived in Redding. Appellant told the investigator that he realized the motor home was missing when he flew to Redding on the morning of the 19th. The investigator felt that appellant's statements were conflicting and inconsistent.

Chris Gurasich testified that appellant was meticulous about the care of his vehicle and admitted that it was uncharacteristic of his father not to have repaired a flat tire after being informed of it. During the summer of 1986 Chris lived with appellant and answered two calls from Vaccaro. (Telephone records revealed only one call.) Vaccaro mentioned a proposed turkey hunt to Chris who asked his father's permission to accompany them.

On Sunday, September 21, 1986, appellant's cousin and hunting companion, Carl Zitkovich, was visiting appellant and discussed a turkey hunt appellant was

planning. Appellant mentioned that the motor home, their usual mode of transportation, was missing and appeared upset. Appellant, very upset, also told Chris about the missing vehicle.

A year later in October 1987 when Zitkovich and others accompanied appellant on a hunting trip, Zitkovich mentioned the missing motor home and again appellant became upset. Appellant said that he thought Vaccaro, the man who was supposed to help him with arrangements for the turkey hunt, was involved in the theft of the motor home. Appellant's hunting and fishing companions had never gone on a hunting trip with Vaccaro.[1] Prosecution investigators conducted an extensive search of Vaccaro's and appellant's financial records but found no evidence of any payoff from appellant to Vaccaro. They did find a note which read "Call for turkey. Also how much. Check, Vaccaro. $150 per person or party. $155 per person." Stapled to it was a card which read "Ed Miller [phone number], Wild hogs, $150 per day, $100 per hog." Ed Miller was a hunting guide. Appellant did not testify.

In the first trial, appellant and Vaccaro were charged with conspiracy to commit arson of property with the intent to defraud. The overt acts alleged were: 1) on or about September 14, 1986 appellant delivered his mobile home into the possession of Vaccaro; 2) on or about September 22, 1986, appellant reported to the California Highway Patrol and Foremost Insurance Company that

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[1] The turkey hunt never materialized, according to Zitkovich, because of the cost.

his 1983 mobile home had been stolen between September 15 and 19, 1986, from the Redding Airport; and 3) on or about October 7, 1986 Vaccaro caused a California license plate from a Volkswagen to be attached to appellant's mobile home, which had been reported stolen, in place of the Oregon plate. Appellant was also charged with other counts of insurance fraud unrelated to the motor home. The trial court granted the defendants' motions for acquittal on the conspiracy charge. The jury hung on the two charges retried here and acquitted appellant of the other charges of insurance fraud.

At the second trial, the prosecutor proceeded on the theory that appellant aided and abetted in the arson. The jury convicted appellant of arson of the mobile home and intent to defraud Foremost.

DISCUSSION

1. Double Jeopardy

Appellant contends he was placed twice in jeopardy because he was acquitted of the crime of conspiracy to commit arson with intent to defraud at the first trial. Although respondent's brief is silent on the point, we note that the plea of once in jeopardy was not raised at trial. This defense is waived if not asserted by plea before commencement of the second trial. (*People v. Moore*, (1983) 140 Cal.App.3d 508, 511; see also *In re Harron* (1923) 191 Cal. 457, 467; *People v. Frank* (1925) 75 Cal.App. 74.)

Moreover, appellant would lose this battle on the merits as well. California law has traditionally held that conspiracy and the substantive crimes are distinct

offenses and an acquittal or dismissal of a charge of conspiracy does not bar a subsequent prosecution for the substantive crime, even if it was the sole overt act utilized in the conspiracy trial. (*People v. MacMullen* (1933) 218 Ca1.655, 657; *People v. Lyons* (1958) 50 Ca1.2d 245, 260 disapproved on other grounds in *People v. Green* (1980) 27 Ca1.3d 1, 32.)

However, appellant contends that the recent United States Supreme Court case of *Grady v. Corbin* (1990) ___ U.S. ___, 109 L.Ed.2d 548 changes this rule. In *Grady*, the Court held that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the prosecution will prove conduct that constitutes an offense for which the defendant has already been prosecuted. (*Id.*, at. p. 557.) "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." (*Id.*, at p. 564.) Nonetheless, while there may have been two trials, there was but one prosecution. " '[A] retrial of a count on which the jury fails to agree is not "another prosecution" within the meaning of Penal Code section 1023, and hence is not barred by the double jeopardy doctrine. [Citation.]' " (*People v. Allen* (1974) 41 Cal.App.3d 821, 825; see also *People v. Tideman* (1962) 57 Ca1.2d 574, 581.)

2. Sufficiency of Evidence

When appellant moved for acquittal pursuant to Penal Code section 1118.1, the trial court acknowledged that the People's case was very weak, but felt that a jury could make reasonable inferences that appellant was

guilty. The court noted that appellant was not forthcoming to the investigator concerning how the vehicle arrived in Redding and questioned Chris Gurasich's veracity. Appellant asserts the court erred in denying the motion and that insufficient evidence exists to support the judgment.

The test for an 1118.1 motion is the same test applied by an appellate court in reviewing a conviction. (*People v. Bloyd* (1987) 43 Ca1.3d 333, 350.) We look to see whether, from the evidence including reasonable inferences to be drawn therefrom, any substantial evidence exists of each element of the offense charged. (*People v. Rice* (1988) 200 Cal.App.3d 647, 651.) When the trial court denies the motion, the reviewing court must decide whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Rice, supra,* at p. 651; *People v. Poggi* (1988) 45 Ca1.3d 306, 324; *People v. Rich* (1988) 45 Ca1.3d 1036, 1081.)

If the evidence justifies the jury's finding, we cannot reverse merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Redmond* (1969) 71 Ca1.2d 745, 755.) The reviewing court must determine that under no hypothesis is there sufficient evidence to support the verdict. (*Ibid.*) The jury is permitted to make reasonable inferences from the evidence. Moreover, the nature of the crime of arson generally determines that the evidence will be circumstantial. (*People v. Beagle* (1972) 6 Ca1.3d 441, 449 disapproved on other grounds in *People v. Castro* (1985)–38 Ca1.3d 301.) Thus circumstantial evidence may be relied upon to establish culpability for arson. (*People v. Belton* (1980) 105 Cal.App.3d 376, 380.)

There was evidence of incendiary cause and that Vaccaro had the vehicle from which the burnt license plate was taken. Evidence also established that Vaccaro had a motor home similar to appellant's on his lot at sometime in mid to late September and that appellant and Vaccaro were friends. The jury could disbelieve that the calls between appellant and Vaccaro concerned the turkey hunt and reasonably infer that the cluster of calls during the time period of the trips north and the time of the vehicle's disappearance concerned the vehicle instead. We find that substantial evidence supports the jury's verdicts.

3. Alleged Procedural Errors

A. The Seizure Order

Appellant contends the court erred in allowing the People to introduce the seizure order without proof appellant knew it was in effect. The court did not err. The People introduced a letter to the DMV written by appellant indicating that he was told before he thought he "cleared up" the matter that there were seizures on a motor home and a 1980 Chevrolet. Thus an evidentiary basis existed from which the jury could infer actual knowledge and notice of the orders. Appellant's argument that the letter shows he thought he had the matter resolved goes to the weight of the evidence and not to its admissibility.

B. Vaccaro's Inquiry

Appellant asserts that an equally reasonable possibility is that Vaccaro learned that the motor home would

be left at Redding Airport, and that he decided on his own to steal it. He states that he was entitled to have the jury consider this alternate theory, but the trial court refused on hearsay grounds to allow Chris Gurasich to testify what Vaccaro asked him and what Chris told him. Appellant contends the testimony was not hearsay, but was relevant to what was said to show Vaccaro's knowledge of appellant's plans. This alleged error was also asserted as a grounds for new trial.

As the district attorney pointed out at the hearing on the new trial motion, appellant's basis for admission of this evidence was not as clearly stated at the time he sought to have it admitted. The court believed the only relevance to be the truth of the matter asserted, i.e., that appellant would be leaving the vehicle at the Redding Airport at the stated time. Assuming the court's ruling was in error, appellant has failed to establish a miscarriage of justice. (Evid. Code, § 354.)

C. Jack Andrew's Record

Jack Andrews initially told investigators that he did not know how the Volkswagen was registered in his name and did not tell them he traded a Volkswagen to Vaccaro. He also said that "If I had the mentality to do something like that [strip the motor home and burn it] I would probably have the mentality to lie, yes, but I don't." Appellant's counsel sought to introduce records of Andrews' two previous misdemeanor convictions for petty theft of gas from a truck and tools from a Sears Roebuck, which included his own admission of lying to police officer. The trial court excluded the records under

Evidence Code section 352 on grounds that the prejudicial effect would outweigh the relevance.

Although section 28(d) of the California Constitution now makes all relevant evidence admissible in a criminal proceeding, subject to exclusion under section 352, including misdemeanor convictions (see *People v. Harris* (1989) 47 Ca1.3d 1047, 1090, fn. 22), remoteness is still a valid factor for the court's consideration. (*People v. Burns* (1987) 189 Cal.App.3d 734, 737.) Andrews testified that he did not deliberately lie to police officers about trading the Volkswagen to Vaccaro, but thought they were asking about another Volkswagen which he donated to Project Eden. We cannot say that, as a matter of law, the trial court abused its discretion in precluding use of two nine-year-old misdemeanor convictions for use of impeachment.

D. Jury Instruction on Witness Credibility

Appellant contends the court erred in instructing the jury with CALJIC No. 2.21.2 which reads "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

This instruction is appropriate where an evidentiary basis exists for it. (*People v. Allison*) (1989) 48 Ca1.3d 879, 895.) Here there was. Appellant contends there was no evidentiary basis for the prosecution's use of it to impugn

the testimony of Chris Gurasich as there was no evidence to conclude he was willfully false in his testimony that he saw a flat tire on the motor home in the Redding Airport and could not remember the telephone number or address of his girlfriend's grandmother where he stayed. However, the prosecution also argued that Chris lied about the number of calls he answered from Vaccaro during the time he stayed with his father. Chris testified to two calls, but the telephone records only verified one call. Reasonable inferences could support the prosecution's argument. Moreover, the defense also used the instruction to attack Andrew's testimony and appellant does not indicate that he attempted to have the court limit its use. We find no error.

E. Motive Instruction

At the prosecutor's request, the trial court also gave CALJIC No. 2.51 that although motive is not an element of the crime charged, the jury may consider motive or lack of motive as a circumstance in the case. Appellant acknowledges that courts have upheld this instruction (*People v. Roehler* (1985) 167 Cal.App.3d 353, 395), but asserts it was unnecessary and prejudicial in this case. We disagree. The prosecutor asked the jury to infer from circumstantial evidence that appellant's motive in having the motor home stolen and destroyed was to collect insurance proceeds and to avoid paying the DMV penalties. Appellant's argument that a man in his position would not need to destroy a $30,000 motor home to avoid paying $3,000 in fines relates to the weight of the evidence. Circumstantial evidence supported reasonable inferences of motive.

F. Misconduct in Argument

Appellant contends the prosecutor committed prejudicial misconduct in arguing that appellant was a scofflaw because he registered the motor home in Oregon and used it in California where he lived. We disagree. The prosecutor's remark did not go beyond fair comment. (See *People v. Fosselman* (1983) 33 Ca1.3d 572, 580.) Moreover, even if error, it is not reasonably probable that the jury would have reached a different verdict had the court stricken the comment or admonished the jury to disregard it. (*People v. Green, supra,* 27 Cal. 3d 1, 34-36 disapproved on other grounds in *People v. Hall* (1986) 41 Ca1.3d 826.)

4. Sentencing Decision

Appellant contends the court abused its discretion in denying probation because it concluded that appellant wrote a letter to the court anonymously in order to obtain a mistrial. (One of the jurors also received a telephone call, purportedly from another juror, telling her to vote "guilty.") The court reached this conclusion after a hearing in which all jurors, immunized from prosecution, denied having written the letter and appellant also denied under oath that he wrote it or knew anything about it. The prosecution asserted that "grammatical fingerprints" on the letter indicated that appellant wrote it because of certain spelling and grammatical errors similar to letter appellant typed for the probation officer.

Grant or denial or [sic] probation is within the sound discretion of the trial court and exercise of that discretion will not be disturbed on appeal except on a showing that

the court acted in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Ca1.3d 308, 316; *People v. Bolton* (1979) 23 Ca1.3d 208, 216.) A review of the post-trial hearings refutes appellant's contention that the trial court was "warped by prejudice." The court indicated it would consider the letter only as one factor in determining the sentence. Even if error, remand for resentencing would be unnecessary. The court relied upon other proper factors in denying probation and imposing the middle term sentence to state prison including: 1) appellant induced others to participate in the commission of the crime and occupied a position of leadership; and 2) the planning, sophistication, and professionalism of the crime indicated premeditation. The court was also convinced that appellant induced his son to lie on his behalf and was a danger to the community because of his willingness to "bend and shade the rules." Again, appellant fails to demonstrate a miscarriage of justice.

The judgment is affirmed.

NOT TO BE PUBLISHED.

STONE, P.J.

We concur:

YEGAN, J.

ABBE, J.*

---

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Bruce Wm. Dodds, Judge

Superior Court County of Santa Barbara

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Second Appellate District, Division Six, No. B045803 S020552

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

(Filed May 29 1991)

THE PEOPLE,

Respondent

v.

WALTER CHRISTOPHER GURASICH,

Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice

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STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
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B045803

RE: The People
VS.
Gurasich, Walter Christopher

2 Criminal B045803
Santa Barbara No. 169470

APR. 1 1991

THE COURT:

Petition for rehearing denied.

No. 91-352

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WALTER CHRISTOPHER GURASICH,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

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No. 91-352

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

WALTER CHRISTOPHER GURASICH,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 15, the District Attorney of Santa Barbara County, the attorney of record for the People of the State of California in this matter at trial and again following remittitur, respectfully opposes Petitioner's application to this Court for writ of certiorari, made on the ground that his

retrial in this matter was a "'subsequent prosecution' under the meaning of Grady v. Corbin, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990)." ["Question Presented," Petn. for Cert., p. i.]

We oppose the application because petitioner has misstated both the facts of his case and the law of conspiracy in California (by omitting an essential factual element of that crime), and so has contrived to bring his matter within the rule of Grady v. Corbin when, in fact, Grady has no application to his case.

I

PETITIONER MISSTATES THE FACTS OF HIS CASE

Petitioner's argument here is that "when the second trial started, he had already been acquitted of the only conduct the People have ever identified as suggesting criminal activity by him:

purportedly making sure it would not reappear by agreeing to have [his co-defendant] dispose of the vehicle." (Petn. for Cert., p. 10.)

That accurately characterizes the conduct for which he was convicted in his second trial; it utterly mischaracterizes the conduct alleged in support of the crime of which he was acquitted in his first trial.

To be rather more precise about it, petitioner was acquitted by the court in his first trial of the specific allegation that he and Mr. Vaccaro had conspired with the specific and mutual intent to commit arson. The reason he was acquitted on that count was because the court found no sufficient evidence of any such specifically-focused intent. On the other hand, the court allowed the prosecution to proceed to the jury on the arson count on

the theory that petitioner and his co-defendant had specifically agreed to combine their efforts to defraud petitioner's insurance company by making it appear that the motorhome had been stolen and then disposed of by the thief. If that was so (the People were permitted to argue), petitioner was liable as a principal for Mr. Vaccaro's act of disposing of the motorhome by burning it. (The jury hung, eleven to one, for guilt on that theory and a mistrial was declared.)

The "conduct" for which petitioner was acquitted at his first trial was mischaracterized by him to the Court of Appeal as, simply, his criminal "agreement" with Mr. Vaccaro (see AOB 14, 15, 17; ARB 8; Petn. for Rehg. 3, n. 1), though petitioner acknowledged elsewhere in his argument that the specific focus of

the charged conspiracy upon which he was acquitted was the destruction of his motorhome by arson (AOB 13, 16, 17; ARB 7).

Petitioner described his conduct in similar fashion in his petition for review in the California Supreme Court (Petn. for Review, pp. 8-9). His argument there was fully answered by this office in a letter brief opposing review. Review was denied. As noted, petitioner simply recycles that mistaken argument in his application to this Honorable Court.1/

1/ Just in case there might be some doubt about the point of petitioner's argument, here and in the court below, he reiterates it on page 14 of his petition in connection with his "collateral estoppel" argument: "As discussed above, the issue of whether petitioner entered into an agreement with Vaccaro was crucial to any finding that he aided and abetted Vaccaro in committing arson or that he made a fraudulent insurance claim. This factual issue already had been resolved by the first trial, as evidenced by petitioner's acquittal on the conspiracy count." (Emphasis added.)

II

PETITIONER MISSTATES THE ELEMENTS OF THE CRIME OF CONSPIRACY IN CALIFORNIA

As noted, petitioner argued to the Court of Appeal that his conviction of insurance fraud and arson (the latter charge, tried on the theory that he conspired with and thus advised and encouraged co-defendant Vaccaro to make the motorhome "disappear" in furtherance of his own plan to defraud his insurance company) depended "entirely on [evidence of] conduct of which defendant was acquitted in the initial trial" -- i.e., the simple fact of an agreement, regardless of its object. (AOB 12; cf. Petn. for Review, pp. 2, 5 ["same conduct"]; Petn. for Cert., pp. i, 4, 6 ["identical conduct"]; pp. ii, 5, 7, 9 ["same conduct"]; pp. i, 1, 8, 9 ["conduct for which he had been acquitted"].)

To be sure, the "conduct" in question was petitioner's conspiratorial agreement with Mr. Vaccaro. But to what end? "Conspiracy is a 'specific intent' crime. [Citations.] The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. [Citations.] To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of that offense." (People v. Horn, 12 Cal.3d 290, 296, 524 P.2d 1300 (1974). Accord, People v. Marks, 45 Cal.3d 1335, 1345, 755 P.2d 260 (1988).)

Arson for pecuniary gain is a crime in California (Cal. Pen. Code, § 451,

subd. (d)). So is insurance fraud (Cal. Ins. Code, § 556). Thus, the distinction between "conspiracy to commit arson" and "conspiracy to defraud an insurance company" is an important one because quite distinct intents are involved in each, and Grady speaks of "conduct that constitutes an offense." Petitioner must therefore be consistently precise in defining both the conduct for which, he claims, he was acquitted by the trial court at his first trial and the conduct for which he was retried and upon which he was convicted. As he must know, they are not the same.

Revealingly, petitioner's definition of conspiracy under California law in his petition to this Court omits the necessary element of a specific intent to commit a particular crime. He asserts, "Under California law, conspiracy requires proof of two elements: (1) an illegal

agreement, and (2) at least one overt act in furtherance of that agreement People v. Fujita, 43 Cal.App.3d 454, 471 (1974), cert. denied, 421 U.S. 964 (1975))." (Petn. for Cert., p. 12.)

What Fujita said, at the page cited, was, "A criminal conspiracy is an agreement between two or more persons that they will commit an unlawful object (or achieve a lawful object by unlawful means), and in furtherance of the agreement, have committed one overt act toward the achievement of their objective." The argument there was that "no specific intent to defraud [their victim] was proven; hence, the conspiracy charge lacks an essential element." The reviewing court disagreed, noting that the required specific intent "is an almost unavoidable inference from the facts of this case." (Ibid.)

Thus, the existence of a specific crime as the objective of a given conspiratorial agreement (and the conspirators' specific intent to agree to commit that crime, and their intent as well to commit the crime they have agreed upon) are all elements of an actionable criminal conspiracy.2/ Alleging and proving merely an "agreement" between them is not sufficient. That is the reason why allegedly distinct conspiracies (i.e., conspiracies with separate objectives) must be alleged in separate counts of a complaint if the complaint is to survive a demurrer in California. (People v. Elliott, 77 Cal.App.3d 673, 685 (1978).)

2/ The particular intent or state of mind with which the Legislature has said an act must be committed if it is to be a criminal act is an element of that offense. (Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240 (1952).)

III

GRADY v. CORBIN HAS NO PARTICULAR RELEVANCE TO PETITIONER'S CASE

Only by mischaracterizing the conduct of which he was acquitted at his first trial as merely an "agreement" between himself and his co-defendant can petitioner bring himself within the ambit of this Court's decision in Grady v. Corbin, supra, 110 S.Ct. 2084. But an agreement is not a criminal agreement unless it contemplates the commission of a particular crime. Petitioner was acquitted of a conspiracy to commit arson; he was not acquitted of conspiring to commit insurance fraud, nor simply of "conspiring." Because that is so, we now argue, Grady v. Corbin is not relevant to his case.

The key sentence in Grady, in our submission, is, "if, to establish an

essential element of an offense charged in [a subsequent] prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." (110 S.Ct., at p. 2087; our emphasis.)

The "offense for which [petitioner was first] prosecuted" (and acquitted) in this case was not merely "criminal conspiracy" but, precisely, "conspiracy to commit arson." His acquittal of that offense mid-trial in 1988 did not prevent evidence of petitioner's liability for arson from going to that jury on the theory that he and Gurasich had conspired to commit insurance fraud, nor did it bar his retrial for arson on that same theory the next year. The "conduct that constitutes an offense" (to quote Grady) must be conduct that constitutes all the elements of the offense for which the

defendant was previously prosecuted. A careful reading of Grady itself makes that plain.

In Grady this Court expanded the limitations inherent in the test it had announced long before in Blockburger v. United States, 289 U.S. 299, 52 S.Ct. 180 (1932), i.e., if the offense prosecuted in the first trial and the offense prosecuted later "have identical statutory elements or that one is a lesser included offense of the other, then . . . the subsequent prosecution is barred" (Grady, 110 S.Ct. at p. 2090). The Court did so because "the Blockburger test is simply a 'rule of statutory construction,' a guide to determining whether the legislature intended multiple punishments." (Ibid.)

To give the accused the full benefit of the protection of the Double Jeopardy Clause, "beyond merely the

possibility of an enhanced sentence," the Court found it necessary to bar subsequent prosecutions in some circumstances "even if [the] two offenses are sufficiently different to permit the imposition of consecutive sentences . . . where the second prosecution requires the relitigation of factual issues already resolved by the first." (Id., p. 2092, quoting Brown v. Ohio, 432 U.S. 161, 166-167 , n. 6; 97 S.Ct. 2221, 2226, n. 6 (1977).)3/

> "Thus, a subsequent prosecution must do more than merely survive the Blockburger test. As we suggested in [Illinois v.] Vitale [447 U.S. 410, 100 S.Ct. 2260,

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3/ The "factual issue" resolved in petitioner's favor at his first trial was not just whether he had conspired with Mr. Vaccaro to commit some crime, but whether they had conspired to commit arson.

> (1980)], the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."

(110 S.Ct., at p. 2093.)

Mr. Corbin conceded "that Blockburger does not bar prosecution of the reckless manslaughter, criminally negligent homicide, and third-degree reckless assault offenses." The state, for its part, did not contest the lower court's ruling that the "driving while intoxicated" and "vehicular manslaughter" charges were barred under state law and by Blockburger, respectively, and so, the Court noted, "we need only decide whether

the Double Jeopardy Clause prohibits the State from prosecuting Corbin on the homicide and assault charges." (Id., p. 2094 and n. 13.)

The Court concluded that since, "by its own pleadings [in its bill of particulars in the subsequent prosecution] the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted -- driving while intoxicated and failing to keep right of the median -- to establish essential elements of the homicide and assault charges . . . the Double Jeopardy Clause bars this subsequent prosecution.

> "This holding would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which

> Corbin had already been convicted (i.e., if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence)."

(110 S.Ct. at p. 2094; emphasis added.)

Thus, the Court ruled, proving the elements of recklessness or negligence in the subsequent homicide prosecution by producing evidence of Corbin's driving while intoxicated was barred, though proving the same elements by evidence of his driving too fast was not.

In our respectful submission, the rule of Grady v. Corbin is this: Evidence of conduct which establishes one or more but not all elements of an offense alleged in the first prosecution may be relied upon to establish one or more but not all elements of an offense alleged or proved in the subsequent prosecution.

Self-evidently, "driving" was a component element of "driving while intoxicated" in Corbin's case (for which he was convicted in his first trial). Just as clearly, Mr. Gurasich's "agreement" with Vaccaro was a component element of the crime of "conspiring to commit arson," for which he was acquitted in his first trial.

The Double Jeopardy Clause would not have barred Mr. Corbin's subsequent prosecution for negligent or reckless homicide arising out of his act of driving his car if the evidence in that later prosecution proved he (1) drove (2) too fast. That is so because this Court said so. The reason it said so is because the component element of "driving" constituted only part of the offenses of "driving while intoxicated" (for which Corbin was convicted) and of "driving too fast,"

which was not charged or proved in his first trial and so could be alleged in his subsequent trial.

By like reasoning, the Double Jeopardy Clause did not bar Mr. Gurasich's prosecution for arson on the theory he (1) conspired (2) to commit insurance fraud, since that offense was not the crime for which he was prosecuted and acquitted in his first trial, i.e., (1) conspiracy (2) to commit arson.

CONCLUSION

Petitioner Gurasich's petition for writ of certiorari should be denied, because it baldly mischaracterizes the "conduct" of which he was acquitted at his first trial, misstates the elements of the crime of conspiracy in California and misreads the holding of this Court in

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Grady v. Corbin, 110 S.Ct. 1082, the case upon which it relies.

Respectfully submitted,

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No. 91-352

In The

Supreme Court of the United States

October Term, 1991

WALTER CHRISTOPHER GURASICH,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For Certiorari To The Court Of Appeal Of California, Second Appellate District

REPLY TO BRIEF IN OPPOSITION

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No. 91-352

In The

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WALTER CHRISTOPHER GURASICH,

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v.

PEOPLE OF THE STATE OF CALIFORNIA,

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Petition For Certiorari To The Court Of Appeal Of California, Second Appellate District

REPLY TO BRIEF IN OPPOSITION

Pursuant to the Court's Rule 15.6, petitioner Walter Gurasich respectfully submits this reply brief addressing arguments first raised in the State of California's brief in opposition. In his petition for a writ of certiorari, petitioner argued that, under *Grady v. Corbin*, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 199 (1990), his second prosecution violated the prohibition against double jeopardy because the state in the second trial relied on conduct for which petitioner already had been acquitted – that is, the

alleged agreement between petitioner and Vaccaro to destroy the motorhome.

The state now concedes that the conduct sought to be proved in the two prosecutions was the same. Its brief in opposition to the petition acknowledges: "to be sure, the 'conduct' in question was petitioner's conspiratorial agreement with Mr. Vaccaro." (Opp. 7).[1]

The state argues, however, that it does not matter whether the conduct involved in the two trials was identical, so long as the two crimes involved separate elements – i.e., intent (Opp. 7). Specifically, the state argues that petitioner's acquittal for conspiracy to commit arson did not bar his subsequent prosecution for conspiracy to commit insurance fraud because an agreement to burn a motorhome is different from an agreement to defraud an insurance company by burning a motorhome (Opp. 10, 19).

According to the state, a subsequent prosecution is barred only when the government must prove in the second trial "conduct that constitutes *all the elements* of the offense for which the defendant was previously prosecuted." (Opp. 12-13, emphasis in original). The state further argues that, under its reading of *Grady*,

> "Evidence of conduct which establishes one or more *but not all* elements of an offense alleged in the first prosecution may be relied upon to establish one or more *but not all* elements of an

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[1] The state's brief in opposition to the petition for a writ of certiorari is cited as "Opp.", followed by a page number.

> offense alleged or proved in the subsequent prosecution."

(Opp. 17, emphasis in the original). In other words, if two offenses contain different elements, then double jeopardy does not bar separate prosecutions.

This conclusion, of course, is simply a restatement of the "elements of the offense" test established in *Blockburger v. United States*, 289 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Yet, as this Court held in *Grady*, the *Blockburger* analysis is only the first step in determining whether the Double Jeopardy Clause prohibits a successive prosecution (*Grady, supra*, 110 S.Ct. at 2090). Even when a successive prosecution survives *Blockburger* analysis, the second trial is prohibited if a conviction in that trial would require proof of conduct for which the defendant has already been prosecuted (*Id.* at 2093).

The point which respondent misses or ignores is that the state cannot transform an acquittal of conduct into a conviction for such conduct by the vehicle of successive, but subtly re-named, prosecutions. Petitioner was acquitted of agreeing with Vaccaro to burn his motorhome. He should not have been continually prosecuted for such conspiracy until convicted of some differently-named, but factually-identical, offense.

CONCLUSION

If the State of California is as confused about *Grady's* import as its brief suggests, the need for clarification from this Court is unmistakable.

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